

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 08-21

January 8, 2008

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Court Mediation

In order to deal with ever-increasing backlogs, all of the United States Circuit Courts of Appeals have mediation programs. Many of the circuit courts have made participation in mediation mandatory. The Agency's policy is to fully participate in these mediation programs in hopes of reaching a resolution consistent with important Agency principles and, where appropriate, avoiding the additional delays required by extended litigation.

As described below, success in mediation will require close and sustained coordination between the Appellate Court Branch (ACB) and the Regions. Our experience is that approximately half of those cases going to mediation have been resolved. Unfortunately, each court's system is different and predicting when a mediation will be scheduled is not always possible. Generally, mediators expect Agency representatives to come to the table prepared to discuss the backpay calculations in detail as well as any other actions required to settle the case.

Full and regular communication and collaboration between the Regions and ACB is essential to the success of this program. In order to maximize the Agency's potential for success in mediation, Regions should provide as much information as possible to the ACB regarding backpay, other monetary remedial calculations and settlement efforts at the time the recommendation for enforcement is submitted.<sup>1</sup> The success in these cases is due in large part to the Region's efforts to maintain contact with discriminatees and calculate backpay. However, if a respondent has failed to provide adequate records to the Region for an accurate calculation of backpay, the enforcement recommendation should set forth, to the extent feasible, what documents are needed to accurately calculate backpay and what steps were taken by the Region to obtain the necessary documents. Despite a respondent's lack of cooperation, the Region should prepare calculations based on information in its possession giving every benefit of the doubt to the discriminatees. During the mediation, ACB will attempt to seek a commitment from respondent to make the necessary records available to the Region as soon as possible.

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<sup>1</sup> Extant policy requires Regions to begin developing backpay data as soon as there has been a merit determination. Thus, the compliance office should be sending correspondence to discriminatees regarding interim earnings, etc. shortly after a merit determination has been made. See Compliance Manual Section 10506.3.

Upon receipt of the enforcement recommendation by ACB, an e-mail will be sent to the submitting official (usually the Regional Director), with a copy to the Compliance Officer, acknowledging receipt of the enforcement recommendation. If a confirming e-mail is not received within several days of submission, the Region should contact the Appellate Court Branch. In order to ensure continuity, the Regional Director should be copied on all correspondence between ACB and the Region.

Once the case has been referred for enforcement, the case is properly within the control of ACB. After referral of the case, Regions should continue to pursue compliance or settlement and consult in a timely manner with ACB about any progress in achieving compliance and/or significant developments in the case. Once a case is in court mediation, the Region should not initiate or engage in settlement discussions with respondents. Moreover, all settlement discussions with respondents after the case has been referred to mediation should be coordinated by ACB, with Regional personnel assisting and working closely with ACB to facilitate a favorable result. Settlement discussions between ACB and the parties will be shared with the Region.

When ACB is notified that a case will be submitted to mediation, ACB will contact the Regional Director or his or her designee to discuss the status of settlement, backpay calculations and the time frame for mediation. If calculations have not already been provided, ACB and the Regional Director or his or her designee will agree upon a schedule for completing backpay computations. If respondent has not made its records available, as noted above, ACB will work through the mediator to seek a commitment from respondent to make the necessary records available to the Region as soon as possible. Recognizing the court's goal of resolving matters as quickly as possible, Regions should make the necessary resources available to meet the agreed upon schedule.<sup>2</sup>

In order to support the critical goal of achieving success consistent with important Agency policies, when a case is in mediation, ACB and the Region will discuss the Agency's settlement posture and goals throughout the process, with the aim of arriving at a consensus on those points. As the mediation proceeds, ACB will keep the Region fully informed of the status of each mediation session, and will discuss any substantive developments. ACB will not commit the Agency to any proposal that does not meet the agreed-upon goals without first discussing that proposal with the Region. If the Region and ACB have significant disagreements about the goals of a mediation, the Region should contact the appropriate AGC or Deputy. Disagreements that Enforcement and Operations are unable to resolve will be presented to the Deputy General Counsel for resolution.

Further, ACB will promptly notify the Region when a mediation ends without a settlement and will provide information regarding the briefing schedule.<sup>3</sup> A

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<sup>2</sup> If the Region does not have the resources to complete the calculations consistent with the mediation schedule, the Regional Director should contact Operations-Management to request assistance. In addition, in complex cases, the procedures provided in the Compliance Casehandling Manual 10592.5 for providing backpay calculations may be applicable in preparing for mediation.

<sup>3</sup> ACB will also share the oral argument schedule as soon as it becomes available.

representative of the Region may participate in a mediation session, when, in the judgment of ACB, such attendance would be useful. In those circumstances the ACB representative remains the agency's spokesperson.

In order for the Regions to obtain a better understanding of the mediation process and to promote the closest possible dialogue between ACB and the Regions, videoconference meetings between the Appellate Court Branch Settlement Director, the Regional Offices and the Assistant General Counsel have been scheduled for the dates and times set forth below. Each session should last approximately thirty minutes to one hour based on topics raised by the Regions. The Region should designate which individuals will attend the videoconference and provide the names of the participants to DAGC Beth Tursell along with a list of questions/topics the Region would like to discuss during the session. At a minimum, at least the Regional Director and Supervisory/Compliance Officer should attend.

District 1	Wednesday, February 13	11:00 am EST
District 2	Wednesday, February 13	2:00 pm EST
District 3	Wednesday, February 20	11:00 pm EST
District 4	Wednesday, February 27	2:00 pm EST

If you have any questions concerning these matters, please contact your AGC or Deputy or the undersigned.

/s/  
R. A. S.

cc: NLRBU  
Release to the Public

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